No. 91-1629

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WARD H. FEITT,

Petitioner

vs.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY,

Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Third Circuit

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QUESTION PRESENTED FOR REVIEW

1. Where the OTS seeks money damages for failure of the president of a viable and highly solvent savings association to document monies received from the savings association for expense account and business-related items, which funds are to be paid to the savings association, is the defendant entitled to a jury trial under the Seventh Amendment to the Constitution of the United States?

2. Can Congress deprive an Article III court of jurisdiction to pass upon a citizen's constitutionally protected right to a jury trial where the issue is one purely of law so that a citizen would not be required to go through the

expensive and prolonged administrative law proceedings before asserting a violation of his Seventh Amendment right to a jury trial?

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1. Where the OTS seeks money damages for failure of Feitt to document monies received from a viable and highly solvent savings association for expense account expenditures and business-related items, is Feitt entitled to a jury trial under the Seventh Amendment to the Constitution of the United States?

2. Can Congress deprive an Article III court of jurisdiction to pass upon a citizen's constitutionally protected right to a jury trial where the issue is one purely of law so that a citizen would not be required to go through the expensive and prolonged administrative law proceedings before asserting a violation of his Seventh Amendment rights to a jury trial?

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PARTIES TO THE PROCEEDING

The parties to the proceeding are as set forth in the caption in the court below.

OPINIONS BELOW

The Court of Appeals opinion, un-unreported, is attached hereto as App. 1-a-12a). The decision is referenced in the table of decisions without reported opinions at 950 F.2d 721. The order of court denying petition for rehearing, suggestion for rehearing in banc filed by petitioner was denied on December 27, 1991 (App. 13a). An order denying appellee's petition for rehearing before the original panel was denied on January 14, 1992 (App. 15a).

The transcript of the oral opinion of the district court is attached hereto as App. 17a.

The order of the district court entered April 2, 1991 is attached as App. 31a.

JURISDICTION

This petition is brought pursuant to 28 U.S.C. § 1254(1) to review the order of the Court of Appeals for the Third Circuit dated November 14, 1991. Orders denying petitions for rehearing were entered against petitioner on December 27, 1991 (App. 13a) and against respondent on January 14, 1992 (App. 15a). This petition is timely under the provisions of Rule 13.4 of this Court, which provides that a petition for writ of certiorari to review a judgment of the Court of Appeals for the Third Circuit will be timely if filed within ninety (90) days after the entry of judgment and that the time runs from the date of the denial of the petition for

rehearing filed by any party.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Seventh Amendment to the Constitution of the United States:

> In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Article III of the Constitution of the United States:

Sections 1:

> The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2:

> The judicial Power shall extend to all cases, in Law, and Equity, arising under this Constitution, the laws of the United States, and treaties made. . . .

Title 12 U.S.C. § 1818(b)(6) at pages App. 33a.

Title 12 U.S.C. § 1818(b)(7), **Authority to Limit Activities**, at App. 36a.

12 U.S.C. § 1818(h)(2), **Hearings and Judicial Review**, at App. 40a.

12 U.S.C. § 1818(i)(1), App. 42a.

STATEMENT OF THE CASE

On January 3, 1991, the Office of Thrift Supervision ("OTS") issued Order No. AP 91-1. At the same time the OTS issued a notice of charges and indicated that a hearing would be held for an order compelling Feitt to cease and desist from being an officer and director of Grandview Savings Association ("Grandview") and to compel affirmative relief such as restitution and reimbursement for business expenses charged to Grandview. The notice of charges attempts to assess a money damage award against Feitt in the sum of

$265,080.00 together with interest of $163,218.00 for undocumented business expenses dating back to 1982.

At the time of the issuance of the order, Grandview was and still is a highly solvent savings association.

Under the ex parte temporary cease and desist order, Feitt was ordered to no later than 12:00 noon on Friday, January 18, 1991, provide security in the amount of $469,639.00 to be complied with in the following manner: (1) by paying cash to Grandview; (2) by establishing and maintaining an escrow account in the amount of $469,639.00 at a financial institution with an escrow agent approved by the Director of OTS; (3) by providing an irrevocable letter of credit or fidelity bond from a federally insured institution or an insurer approved by the Director of OTS

and subject to terms and conditions as approved by the Director of OTS, or by providing other security deemed adequate by the Director of OTS. The entity to which payment was to be made was Grandview Savings Association.

The order further requires Feitt to submit, within fifteen days, his United States and state tax returns for 1988 and 1989 and a financial statement prepared and certified to by a nationally recognized firm of certified public accountants. Feitt is prohibited from making expenditures in excess of $2,000.00 or more, whether singularly or through related transactions unless he gives the OTS two full business days advance written notice.

On January 15, 1991, Feitt filed a complaint in the district court attaching a copy of the proceedings before the

OTS and requesting a temporary stay and demanding a hearing to determine whether the OTS had jurisdiction personally over Feitt to issue a personal judgment in the amount of $428,298.00 or whether Feitt is entitled to a jury trial so that his property will not be taken without due process of law and in violation of the Seventh Amendment to the Constitution of the United States guaranteeing him a right to trial by jury.

At a hearing in the district court, Feitt introduced exhibits showing, inter alia, that Bauer Financial Reports, Inc., of Coral Gables, Florida, gave Grandview its five-star rating stating in its certificate that Grandview "is one of the safest, credit worthy savings associations in the United States." The award was dated December, 1990. Also, a

notice from IDC Financial Publishing, Inc. was introduced into evidence that Grandview had been rated among the top fifteen percent of thrifts in the nation and a letter dated December 27, 1988 from the Director of the Savings Associations Bureau of the Commonwealth of Pennsylvania was introduced congratulating Grandview on the very fine operating results and earning the rating as one of the nation's safest thrifts.

In addition, an exhibit dated February 13, 1989 from the state joint examiner was introduced, which advised Grandview that its response to the 1988 joint federal-state audit was generally satisfactory and the file covering "the recent examination report has been closed." A copy of that letter was sent to the federal examiners who conducted the joint examination.

The district court, without taking any evidence other than the exhibits above referred to, found that it had jurisdiction but denied Feitt's claim for relief. (App. 17a-30a).

An appeal was taken to the Court of Appeals for the Third Circuit, which held that the district court did not have jurisdiction and that Feitt would have to exhaust his administrative remedies before raising the issue before the Court of Appeals for either the District of Columbia Circuit or the Third Circuit as provided by statute. Feitt filed a petition for rehearing by the court in banc and the OTS filed a petition for rehearing. Both petitions were denied, the OTS petition being denied on January 14, 1992. This petition for certiorari is submitted to review the order of the Court of Appeals

for the Third Circuit.

REASONS FOR GRANTING THE WRIT

1. Where the OTS is seeking money damages for failure of Feitt to document monies received from a viable and highly solvent savings association for expense account expenditures and business-related items, is Feitt entitled to a jury trial under the Seventh Amendment to the Constitution of the United States?

2. Can Congress deprive an Article III court of jurisdiction to pass upon a citizen's constitutionally protected right to a jury trial where the issue is one purely of law so that a citizen would not be required to go through the expensive and prolonged administrative law proceedings before asserting a

violation of his Seventh Amendment right to a jury trial?

In Larimore v. Controller of the Currency, 789 F.2d 1244 at 1256 (7th Cir. 1986), the court held:

> Thus, bank directors are to be adjudged personally liable only after receiving all of the constitutional and legal protections accorded every citizen in a trial in the United States District Court. These protections would effectively be abolished and the clear intent of Section 93 would be cast aside if 12 U.S.C. § 1818(b)(1) were to be interpreted as granting the Controller the authority to act as prosecutor, judge and jury and unilaterally issue an order to an individual director to indemnify the bank.

In the instant proceeding, the order issued by the OTS is signed by Timothy Ryan, Director of the Office of Thrift Supervision. Under the Administrative Procedure Act governing the OTS, the administrative law judge is without jurisdiction to make any decision which

would constitute a final judgment in the case. (12 CFR 509.4g) Furthermore, the administrative law judge only has the power to make a recommended decision. 12 C.F.R. 509.4(2) The issue then goes to the prosecutor, Timothy Ryan, Director of the OTS. Under 12 CFR 509.31, the record is filed with the Secretariat of the OTS and after filing of exceptions and briefs,"the Secretariat shall notify the parties in writing that the case has been submitted to the Office for final decision." (Emphasis added) Under the Code of Federal Regulations, the employees of the office who are not engaged in any way in the performance of investigatory or adjudicatory functions in connection with the proceeding, advise and assist the Office in the consideration of the proceeding. The

regulations then provide:

> The Office shall consider the recommended decision and the whole record on review and shall base its determination thereon.

12 C.F.R. 509.32(a). It would appear that the Code of Federal Regulations, by referring to "the Office" is attempting to distinguish the prosecutor from the jury, a procedure condemned in Larimore.

This Court, in Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782, 106 L.Ed. 2d 26 (1989), held that Congress lacks the power to strip parties contesting matters of private right of their constitutional right to a jury trial. The Court of Appeals for the Third Circuit, in Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990), held:

> "Where an action is simply for . . . the recovery of a money judgment, the action is one at law. . . . Hence, a complete remedy is available at law,

> and equity will not allow an action in such a case."

The Third Circuit also in Amoco Oil Company v. Torcomian, 722 F.2d 1099 (3d Cir. 1983), held that equitable and legal claims when intertwined would not defeat the Seventh Amendment right to a jury trial. This Court, in Northern Pipline Construction v. Marathon Pipeline Company, 102 S.Ct. 2858 at 2878 (1982), held as follows:

> No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Article III, courts.

The Court of Appeals relied on cases which have no bearing on the issue

presented on this petition for certiorari. In both Getty Oil Co. v. Ruckleshaus, 467 F.2d 349 (3d Cir. 1972), and Solar Turbines, Inc. v. Seiff, 879 F.2d 1073 (3d Cir. 1989), the agency action involved rights created by statute. The Clean Air Act expressly set forth the procedural route and timing for judicial review of Environmental Protection Agency action. The expertise of an agency in a specific area such as clean air or occupational safety or Social Security or the myriad or other alphabetic creations of Congress obviously do not have Seventh Amendment constitutional protection because they did not exist in Merry Old England.

The suggestion by the Court of Appeals that Feitt can be made whole after taking an appeal from the OTS'

decision simply ignores the power which the courts are abdicating in favor of agency action. Credibility, just as it is said of beauty, is in the eyes of the beholder. Courts instruct juries on the many things they may use to assist in determining the credibility of witnesses. Their demeanor on the stand; their knowledge of the facts; their interest in the case; and all of the other intangible elements which one uses in determining credibility. As stated by the author in 71 Minn.L.Rev. 1035 at 1061:

> That a defendant director has an opportunity to appeal the agency order to a court of appeals does not neutralize the agency's power. On appeal a court will vacate the order only if the factual findings are not supported by substantial evidence or if the order is arbitrary and capricious. Thus the appellant director, not the agency, bears the burden of proof on appeal. . . The traditional

deference courts afford to agency discretion further compounds the difficulty of overturning the agency decision.

For a review of the prosecutor-jury-judge-OTS decision, a court of appeals may find substantial evidence from facts which an impartial factfinder seeing the witnesses, having the initial determination of credibility might well conclude is incredible. For example, in this case the facts will show that although there was a joint federal-state examination of Grandview from 1982 through 1989, the examiners did not charge Feitt with failure to document business expenses deducted by the association. The examiners' reports would indicate that Grandview retained a higher capital ratio than its peers and was in a highly solvent condition. The evidence would show that the examiners closed the file for 1988.

To attempt to prove to the bureaucracy overseeing Grandview that their fellow employees did not find the Grandview practices unsafe or unsound for nine years is to ignore the facts of life. To believe that Timothy Ryan, who issued the cease and desist order and the notice of charges, will now review the evidence and exhibits without any predisposition to upholding his stated position or that of his staff as set forth in the temporary cease and desist order and notice of charges is to confer on the head of a federal bureau an unrealistic standard of impartiality. The failure of Article III courts to decide a constitutional issue and prohibit Congress from legislating around Larimore puts a severe dent in the Seventh Amendment rights to trial by jury and ignores the prophecy of Alexis

deTouqueville when he observed the operation of democracy in America:

> Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that has ever been devised against the tyranny of political assemblies. 1

The Clean Air Act cases and the other administrative agency creations of Congress involve facts relating to the technical aspects of the operation of an agency. The creation of those rights and duties by Congress allows the creation of the bureaucracy that administers them subject to due process limitations. This case does not involve the application of technical facts. It involves an allegation that business-related

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1 Democracy in America, Ch. 6, Henry Reeve text as revised by Francis Bowen, 1845.

expenses were not documented. It involves a suit for money damages, the traditional adversarial proceeding before a finder of fact -- a jury, not an administrative law judge or director of OTS.

It is obvious that Feitt is being deprived of his right to a trial by jury.

In Pennsylvania, the exercise of equity jurisdiction by a court of common pleas is unique. See Calabrese v. Collier Township Municipal Authority, 430 Pa. 289, 240 A.2d 544 (1968). As stated in Calabrese, the courts of common pleas in Pennsylvania recognized and applied equitable principles as part of the common law of the Commonwealth but the courts neither possess nor exercise the powers of a court of chancery by reason of an existing public

prejudice against chancery courts. The case refers to Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 1, §§ 338, 342, and 1 Standard Pa. Practice, pp. xix, xxi. In a footnote, the Supreme Court of Pennsylvania referred to the apparent prejudice from the fact that a trial in chancery con- sisted of a trial by a single judge as distinguished from a trial by jury in a court of law and as early as 1862 the Pennsylvania Supreme Court had held in North Penn Coal Company v. Snowden, 6 Wright, 42 Pa. 488 (1862), that the legislature had constitutional power to transfer any part of the jurisdiction of a court of law such as a court of common pleas to a court which proceeded according to the course of a court of chancery. The Calabrese case then holds that the extent to which a court of common pleas

may exercise chancery powers lies within the control of the legislature and not from common law.

At the outset, therefore, its is apparent that in Pennsylvania the Seventh Amendment right to trial by jury was not impinged by actions which could have been brought in equity in other jurisdictions.

In Tull v. United States, 107 S.Ct. 1831 at 1839, 481 U.S. 412 (1987), this Court held:

> If legal claim is joined with equitable claim, the right to jury trial on the legal claim including all issues common to both claims remains intact. Rights cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought. . . Thus, petitioner has a constitutional right to a jury trial to determine his liability on the legal claims.

The Tull case involved an attempt by the Environmental Protection Agency to im-

pose in excess of $22 million in damages against Tull in a nonjury trial before the district court. This Court held that he was entitled to a jury trial.

Again, this Court in Granfinanciera cogently stated:

> "Legal claims are not magically converted into equitable issues by their presentation to a court of equity. . . . nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal."

This Court has also held that the expansion of adequate legal remedies provided by the Federal Rules of Civil Procedure necessarily affects the scope of equity and that now under the Rules there is only one action -- a civil action -- in which all claims may be joined and all remedies are available. Ross v. Bernard, 396 U.S. 531, 540, 90

S.Ct. 733 at 739 (1970).

On the exhaustion of administrative remedies doctrine, the courts have held that where agency proceedings will be futile, the exhaustion doctrine is not to be applied inflexibly. McGee v. United States, 402 U.S. 479 at 483, 91 S.Ct. 1565 at 1568 (1971). A court is free to use its discretion in applying the exhaustion of administrative remedies doctrine and when the various interests served pull in the direction of exhaustion, exhaustion is required but where they pull in different directions analysis of the particular case at hand is necessary. See also, Commonwealth of Mass. v. Lyng, 893 F.2d 424 (1st Cir. 1990).

CONCLUSION

Grandview is the real party in interest on whose behalf OTS purports to act. The money damages being sought by the OTS are to be paid to Grandview. The claim involves a factual determination on issues traditionally tried before a jury. Even if expenses paid on behalf of Feitt are not documented, an impartial jury could find that as to Grandview they were business related and Grandview is not entitled to reimbursement, restitution or money damages.

The issue of whether Feitt was misled by the actions of co-employees of the "Office" would disqualify co-employees from sitting as impartial jurors in the case. Under the statutory scheme of things, the "Office" and co-employees will be the final factfinders and decision-makers, even without

conferring directly about the proceedings.

The constitutional issue is raised before an Article III court. There are no agency areas of expertise required to make the legal determination that Feitt is entitled to a trial by jury. That determination should be made now, without the cumbersome and expensive administrative law proceedings. These administrative law proceedings do not even allow the administrative law judge to make the determination and to terminate the OTS action on its merits. The action of the Court of Appeals for the Third Circuit should be reversed and the matter remanded to the district court to accord Feitt his right to trial by jury.

Respectfully submitted,

HAROLD GONDELMAN

Attorney for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3198

WARD H. FEITT,

Appellant

vs.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY

On Appeal From the United States
District Court for the Western
District of Pennsylvania

(D.C. Civil Action No. 91-0067)
District Judge: Donald E. Ziegler

Argued: September 3, 1991

BEFORE: STAPLETON, GREENBERG AND
ALDISERT, Circuit Judges

(Opinion Filed Nov. 14, 1991)

OPINION OF THE COURT

STAPLETON, Circuit Judge:

Until October 29, 1990, Ward Feitt was a director of a Pittsburgh mutual savings association, Grandview Savings Association ("Grandview"). Grandview holds net assets of approximately $20 million. Its financial condition is generally sound but declining. Its expenditures to cover employee expenses, most of which were attributable to Feitt, were five times those of comparable institutions. Among the business expenses Feitt allegedly charged to Grandview were trips to Acapulco and Costa Rica (where Grandview has no business), memberships and bills from at least five country, social clubs, over $3,000 worth of goods from the pro shop at one country club, and over $600 for his own cigars. Despite being warned by federal and state regulators in 1982, Feitt has also

allegedly kept inadequate records of the disbursements made to him and their purposes.

As a result of a joint state-federal investigation begun in 1989, the Office of Thrift Supervision ("OTS") has sought restitution on behalf of Grandview for $265,080, plus $163,218 in interest on that money, for a total of $428.298. It has also sought a civil money penalty of $88,893.

OTS sought this restitution by filing on January 3, 1991, a "Notice of charges and hearing for an order to cease and desist and direct restitution and other relief." That same day, OTS issued an ex parte order of suspension and a temporary cease and desist order. The temporary order, among other provisions, required Feitt to post security by January 18, 1991, for the

$428,298 claim against him. The proceeding on OTS's restitution claim is still pending before an administrative law judge.

Feitt then brought this case in the district court, seeking a declaratory judgment on his various challenges to OTS's action and seeking a preliminary injunction to stay the administrative proceedings against him. OTS responded by filing a motion for summary judgment on Feitt's claims and a petition for summary enforcement of the temporary cease and desist order. After a hearing on April 2, 1991, the district court issued an oral ruling. It held that it had general federal question jurisdiction over Feitt's claims, but found those claims without merit. Therefore, the district court denied Feitt's application for a preliminary

injunction and entered summary judgment in favor of OTS on his claims. The district court also granted OTS's petition for summary enforcement of the temporary cease and desist order. Feitt filed a timely appeal from the final judgment.

The district court had jurisdiction over OTS's petition for summary enforcement of its temporary cease and desist order pursuant to 12 U.S.C. § 1818(d). It also had jurisdiction over Feitt's challenge to that same order pursuant to 12 U.S.C. § 1818(c)(2). As will be discussed further below, 12 U.S.C. § 1818(i) eliminates any jurisdiction the district court would otherwise have had over Feitt's other claims, and, therefore, no jurisdiction existed over those claims. This court has jurisdiction over an appeal from a

final judgment of the district court pursuant to 28 U.S.C. § 1291. This court has plenary review of the district court's ruling on jurisdiction.

Title 12 U.S.C. § 1818(i)(1) states in relevant part:

> except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside such notice or order.

Thus, the district court lacked jurisdiction over Feitt's claims unless they fell within one of the specific exceptions contained elsewhere in § 1818.

Section 1818 does provide individuals such as Feitt with means to challenge the actions of banking agencies, but those means are specific and limited. While an administrative

proceeding is ongoing, Feitt may challenge the temporary cease and desist order in federal district court pursuant to § 1818(c)(2). When a permanent cease and desist order is issued, Feitt may file a challenge to it in the appropriate court of appeals pursuant to § 1818(h)(2). Section 1818 also provides that banking agencies may invoke the jurisdiction of the district courts to enforce both their temporary (§ 1818(d)) and their permanent (§ 1818(i)(1)) orders. As this court has previously notes, "[t]o assure the speed and efficiency of the administrative scheme, judicial interference in the proceedings is limited to these specified situations." Eastern National Bank v. Conover, 786 F.2d 192, 193 (3d Cir. 1986) (per curiam); accord Groos National Bank v. Comptroller of

Currency, 573 F.2d 889, 895 (5th Cir. 1978) ("section 1818(i) in terms removes the courts jurisdiction to issue an injunction affecting the regulatory agency's notice or order, except as [expressly] provided in section 1881 proceedings and review.")

Feitt's attempt to assert general federal question jurisdiction in the face of § 1818(i)'s prohibition is unavailing. When faced with a similar attempt to circumvent statutory limitations on judicial review of agency action involving the Clean Air Act, this court held:

> Because the Act explicitly provides for review of certain actions and explicitly denies review for everything else, we cannot look elsewhere for authority to justify the district court's review. "If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive." Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 356 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1077 (3d Cir. 1989).

Feitt's attempt to enjoin the OTS proceedings against him is precisely the type of interference with regulatory action that § 1818 was intended to foreclose. Therefore, the district court had jurisdiction only over the parties' contentions about the temporary cease and desist order. Feitt's arguments that his Seventh Amendment right to a jury trial is being violated in the administrative proceeding and that OTS's claims are barred by estoppel or laches are premature. If a permanent cease and desist order is ultimately entered against Feitt, he will have an opportunity to raise those arguments on a direct appeal to a court of appeals pursuant to § 1818(h)(2), and if no order is ultimately entered, he will

have no cause for complaint.

As we have noted, the district court did have jurisdiction to entertain Feitt's attack on the cease and desist order. More specifically, the district court had the jurisdiction necessary to entertain his claim that the requirement of a bond during the pendency of the administrative proceeding 1/ violated both due process of law and the statute authorizing OTS to issue cease and desist orders. We conclude, however, that this court no longer has jurisdiction to hear that claim because it is moot.

Following the filing of the notice of appeal from the district court's

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1/ There are several other aspects of the cease and desist order, but, as counsel expressly confirmed at oral argument, Feitt does not challenge the validity of any provision of that order other than the requirement of a bond.

order enforcing the cease and desist order, OTS filed a motion for an order finding Feitt in contempt for failure to file a bond. For reasons that do not appear in the record, the district court determined that Feitt's failure to file a bond did not constitute contempt of its enforcement order and denied OTS' motion. OTS's time for appealing the denial of its contempt application has now run without a notice of appeal having been filed.

Under the law of the case, Feitt, as matters now stand, is not subject to an enforceable obligation to file a bond and OTS acknowledges that its administrative proceeding is going forward without one. While it is conceivable that changed circumstances in the future may entitle OTS to ask the district court for some further relief, we

conclude that the issue between the parties regarding the bond is now moot. Accordingly, we decline to address Feitt's due process and statutory arguments.

We will reverse the judgment of the district court and remand with instructions to dismiss for want of jurisdiction all of Feitt's claims other than his challenge to the validity of the bond requirement of the cease and desist order and to reinstate those portions of its enforcement order other than the portion imposing that requirement.

TO THE CLERK:

Please file the foregoing not for publication opinion.

/s/ Walter K. Stapleton
Circuit Judge

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3198

WARD H. FEITT,

Appellant

vs.

OFFICE OF THIRFT SUPERVISION,
DEPARTMENT OF THE TREASURY

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON,
SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, and ALDISERT,

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court.

/s/ Walter K. Stapleton

Dated: Dec 27 1991

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3198

WARD H. FEITT,

Appellant

vs.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY

SUR PETITION FOR PANEL HEARING

BEFORE: STAPLETON, GREENBERG and
ALDISERT, Circuit Judges

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the

petition for rehearing is denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: Jan. 14, 1992
RECEIVED AND FILED
1-14-92 KO
Sally Mrvos
Clerk

APPENDIX

In the United States District Court for the Western District of Pennsylvania

WARD H. FEITT	:	Civil Action
	:	No. 91-0067
vs.	:	
OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF THE TREASURY	:	

THE COURT: Please be seated.

This case is entitled Ward H. Feitt v. Timothy Ryan, Director of the Office of Thrift Supervision, at Civil Action No. 91.-67, and the following shall constitute findings of fact and conclusions of law:

1. This is a civil action for injunctive relief, filed by Ward Feitt against the Director of Thrift Supervision, to enjoin certain administrative proceedings scheduled for April 30, 1991.

2. Jurisdiction is predicated by plaintiff on 28 USC Section 1331, asserting that this Court has original jurisdiction to enjoin the administrative proceedings, because the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended, 12 USC Section 1462, is unconstitutional as applied, because the Act denies plaintiff the Seventh Amendment right to trial by jury.

3. The Court of Appeals for the Third Circuit in First Jersey Securities v. Bergen, 605 F.2d 690, 694 (1979), held that jurisdictional grants to District Courts in cases arising under the Constitution or laws do not mean that jurisdiction may not be precluded by another statute or doctrine of judicial administration. However, in FDIC v. Mallen, 486 U.S. 239, 240

(1987), the Supreme Court sustained the District Court's conclusion that it had original jurisdiction and, therefore, the power to determine the constitutionality of the agency's actions, albeit in a different context. See, also Groos National Bank v. Comptroller, 573 F.2d 889 (Fifth Circuit 1978).

4. We therefore will consider the plaintiff's motion for a preliminary injunction and declaratory relief and proceed to determine the question whether plaintiff is likely to succeed on the merits with respect to his claim for injunctive relief.

5. We find no merit to Mr. Feitt's argument that he is likely to succeed because Grandview is solvent and apparently highly rated. The statute at 12 USC Section 1818(b)(1) authorizes the Director to proceed against a person

such as Mr. Feitt without reference to whether he is currently a director or officer and without reference to whether the institution is solvent or insolvent. See, also, Larimore v. Comptroller of Currency, 789 F.2d 1244, 1245 through - 46 (Seventh Circuit 1986).

6. Plaintiff relies on Larimore v. Comptroller for the proposition that the Director is without authority to seek any of the administrative remedies at issue here, including the claim for restitution in the sum of $428,298. However, as defendant points out, Congress enacted Section 1818(b)(6)(1) in 1989 for the express purpose of overruling Larimore. 1989 Code Congressional & Administrative News 86, at 263 through 264.

7. In Atlas Roofing Company v. Occupational Safety and Health Review

Commission, 430 U.S. 442 (1977), the plaintiffs claimed that their right to a jury trial under the Seventh Amendment was violated by a statutory scheme that permitted the Secretary of Labor and Occupational Health and Safety Review Commission to determine whether violations of the Occupational Safety and Health Act had taken place and, if they had, to issue abatement orders and impose civil penalties. Rejecting the plaintiffs' contention, the Supreme Court stated as follows, and here I quote:

> In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible,

without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.' Congress is not required to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with some special competence in the relevant filed. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency. ***

"The point is that the Seven th Amendment was never intended to establish a jury as the exclusive

mechanism for factfinding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the Amendment should not be interpreted to provide an impenetrable barrier to administrative factfinding under otherwise valid federal regulatory statutes. We cannot conclude that the Amendment rendered Congress powerless -- when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate -- to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law -- such as an administrative agency -- in which facts are not found by juries."

8. In Granfinanciera v. Nordberg, 109 S.Ct. 2782 (1989), the Court reaffirmed the holding of Atlas Roofing by saying as follows:

> "If a claim that is legal in nature asserts a 'public right' ***, then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity. ***
>
> "*** Those cases in which Congress may decline to provide jury trials are ones involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assign- ed to an administrative agency or specialized court of equity."

9. We find that Ward Feitt will not likely succeed on the challenge to administrative factfinding with regard to the cease and desist order, the notice of intention to remove and prohibit plaintiff from participating in the affairs of Grandview, the notice of assessment, and the order that he produce tax returns for 1988-89. and a certified financial statement, and personal records, and refrain from transferring assets. The only remaining question is whether he will likely succeed on the claim that the statutory scheme abridges his constitutional right to a jury trial on the restitution and reimbursement claim of the Director in the sum of $265,080, plus interest of $163,218.

10. An order for restitution has traditionally been considered equitable

in nature rather than legal, although it may involve the determination and return of a sum certain. Moreover, an accounting and restitution are recognized equitable rights and remedies, and no Seventh Amendment right is involved. We hold that restitution from a fiduciary has traditionally been regarded as an equitable remedy, not a legal one, and, therefore, Ward Feitt is not entitled to a jury trial with regard to the order of restitution. See Restatement of Restitution and Unjust Enrichment at 17, Proposed Final Draft 1936. It follows that plaintiff will not likely succeed on the merits with respect to this claim.

11. Tull v. United States, 481 U.S. 412 (1986), is not to the contrary. There, the Court found that the claim was legal in nature, and specifically

distinguished the claim from one for disgorgement of profits and restitution. The instant action is for disgorgement and restitution and, therefore, no Seventh Amendment right is involved. It is a remedy that is traditionally incidental to injunctive relief and, therefore, equitable in nature.

12. Beard v. Braunstein, 914 F.2d 434 (Third Circuit 1990), provides a most comprehensive discuss- ion of the problem. There, the Court discussed the three-prong test of Granfinanciera and found the claim for rent against the debtor to be legal in nature. Applying that test, we find as follows: (1) An action for restitution against a fiduciary is an equitable action, traditionally tried by the courts equity in England; (b) the remedy of restitution is not clearly legal, and

was not plainly and traditionally resolved by the law side of the courts at common law; (c) public rights are involved here in this complex regulatory scheme, with a valid legislative purpose; and (d) an action for restitution is not a state law contract action as in Beard v. Braunstein.

13. We also find that Ward Feitt will not suffer irreparable harm. The constitutional issues can be preserved and raised in the Court of Appeals, as provided by the statutory scheme, following the administrative findings, and the escrow and bonding requirements are subject to review in this Court and the Court of Appeals for reasonableness.

14. We hold that plaintiff has failed to establish irreparable harm and likely success on the merits and,

therefore, the motion for a preliminary injunction must be denied.

15. We find no merit to the argument that the United States or the Director is estopped from proceeding by virtue of the findings of the state or federal examiners in the various examinations that took place over the years.

16. Also pending before the Court is the petition of the Director for summary enforcement of the temporary orders, and a motion for summary judgment. The motion for summary judgment will be granted, because we find, based on the papers of record, that there are no genuine issues of material fact.

A written order will follow, denying the motion of plaintiff for a preliminary injunction and granting the

Director's motion for summary judgment. We will also deny the request for the plaintiff for declaratory relief, because we find no constitutional infirmity in the application of the statute to Ward Feitt.

APPENDIX

In The United States District Court for the Western District of Pennsylvania

Ward H. Feitt,
Plaintiff-Respondent,
vs.
Timothy Ryan, Director of the Office of Thrift Supervision,

Defendant-Petitioner

Civil Action No. 91-67

ORDER OF COURT

AND NOW, this 2nd day of April, 1991, in accordance with the findings of fact and conclusions of law of record,

IT IS ORDERED that the motion of plaintiff, Ward H. Feitt, for preliminary injunction and declaratory relief be and hereby is denied.

IT IS FURTHER ORDERED that the motion of defendant, Timothy Ryan, Director of Thrift Supervision, for

summary judgment be and hereby is granted.

/s/ Donald E. Ziegler

APPENDIX

12 U.S.C.A. § 1818(b)

12 U.S.C.A. § 1818(b), cease and desist proceedings, (6) affirmative action to correct conditions resulting from violations or practices provides as follows:

The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to --

(A) make restitution or provide reimbursement, indemnification, or

guarantee against loss if --

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

12 U.S.C. § 1818(b)(7), **Authority to Limit Activities**, provides:

The authority to issue an order under this subsection or subsection (c) of this section includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(c) **Temporary cease-and-desist orders.**

(1) whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation

thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6)(b) of this section. This order shall become effective upon service upon the

depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsection, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order.

(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial

district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

APPENDIX

12 U.S.C. § 1818(h)(2), **Hearings and Judicial Review:**

Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified,

terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

APPENDIX

Title 12 U.S.C. § 1818(i)(1) states in relevant part:

> . . . except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside such notice or order.